YALE LAW JOURNAL

VOL. XX

JANUARY, 1934

No. 4

THE PROTECTION OF CITIZENS ABROAD AND CHANGE OF ORIGINAL NATIONALITY

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PRECEDENT and time are the creators and preservers of customary law. So strong is the force of habit in human behavior that man in doubt or distress instinctively turns to past experience to see how his forbears dealt with similar problems. The law, which is the cement holding together the social structure, is, in its evolution as a conservative force, of necessity driven to search for precedents and to profit by them in building certainty and thereby security. Without landmarks there is no system; and for the very reason that international law is deficient in its lack of a legislature, it must rely on precedent and practice even more than must municipal law. It is an interesting fact that international law, though it had its birth and much of its intellectual inspiration in civil-law countries, where judge-made law has always occupied a secondary place, has, nevertheless, in the establishment and growth of arbitral (judicial) tribunals, followed the methods of the Anglo-Saxon common law in considering the decisions of courts as a major and primary source of law. Perhaps this modern development was foreshadowed, if not largely aided, by the publication by John Bassett Moore of his monumental archives of governmental practice and the awards of arbitral tribunals—the Digest of International Law and of International Arbitrations. At all events, the habits and behavior patterns of society in its international manifestations are now sought with greatest confidence and authority in the decisions of arbitral tribunals, which are subjected to minute analysis and criticism just because they have acquired so great a force in the structure of international law. They reflect the impartial view of what is soundest and best in the living law, when put to the test of conflict; and while constituting only one manifestation of international life, such decisions are likely, on the whole, to be as detached as so political a subject permits.

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It thus happens that a consistent practice followed by international tribunals of all compositions and qualifications, embodying the matured judgment of the societal agents of organized mankind, commands, and is entitled to command, more respect than are or would be the inspired documents struck off in moments of excitement or than would be the new and untested notions of what the law ought to be, projected on an enervated world with all the hope and temerity of the evangelist. Tested experience is the rock on which progress must build; to cast it aside invites disaster. It is unnecessary to mention the variety of schemes for universal peace by new formulas which have recently been spread before the world, but the writer ventures to believe that to the extent that they have not their roots in history and experience, they are likely to have a painful and perhaps unpromising career. This is true, also, when the attempt is made to overturn established legal doctrines in the name of some new and untested emancipation.

Among the doctrines which, it was thought, had been so thoroughly settled by practice and experience that no change could be conceived, is the practice of the protection of citizens abroad by the state of which they were nationals at the time of injury. The only change that had been seriously proposed is a change induced by the political character of protection—a change designed indeed to diminish or neutralize the political character of such claims by providing machinery to remove them so far as possible to the judicial, hence exclusively legal, channel.

Now, however, through the discussions of the Institute of International Law,¹ it appears that in some quarters the traditional rules are considered reactionary and "out of date," and in the name of an alleged individualism it is proposed to expand diplomatic protection so as to permit the injured national voluntarily to change his nationality by naturalization and thus acquire a new protecting state. The efforts of a century to restrict diplomatic protection are now to be reversed, and proposals are made the only result of which would be widely to extend diplomatic protection. It would be difficult to discover any scheme or suggestion which Foreign Office practice and arbitral tribunals have more firmly rejected than the proposal to permit the injured citizen to choose his own protector by a shift of nationality. Reason, policy, and law had combined to establish the rule of international law, more free from exceptions than most rules of law, that an international claim cannot be advanced by a nation other than that of which the injured person, living or dead, was a national at the time of injury. The reasons for this rule and the policy behind it will be discussed presently; as a preliminary matter, it may be well to consider the fundamental basis or philosophy of diplomatic protection, which has also recently been questioned.

1. (1932) *ANNUAIRE* (Oslo session) 479 *et seq.*

I

The regular authentic practice of protecting citizens abroad did not begin until the migration of peoples and capital, following the establishment of the modern state system, at the time of the Renaissance. The practice thus came into being at a period of intense individualism and *laissez faire*. Yet the institution of protecting citizens abroad is a reflection not of individualism and *laissez faire*, but of a primitive form of clan organization and of an early social institution which deemed an injury to a member of the clan an injury to the clan itself, justifying collective revenge or prosecution. Its modern legal foundation is said to rest upon a principle announced by Vattel:

"Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection."²

The principle may seem theoretical and artificial, and, as will presently be shown, both lawyers and statesmen have drawn from it unjustified conclusions. The protection by force of citizens abroad may have been suited to a time when the foreigner was either an enemy or an outlaw and found little security or safety in the place of his residence. It is common experience, exemplified down to the present moment, that, when security and safety cannot depend on law, a reliance upon force is probably inevitable. But it is questionable whether an institution which is justified under conditions of assumed lawlessness is equally justified under local conditions which give to foreigners a measure of security comparable to that enjoyed by nationals. Indeed, the development of modern industry and international business, with the continuous flow of capital and people across international boundaries, makes it questionable whether so primitive an institution should not be subjected to rigorous limitations more in accordance with the necessities of life in the twentieth century. Some evidence of this conclusion is to be found in the fact that nations have long since hesitated to interpose on behalf of their citizens for the collection of defaulted foreign bonds and for mere breach of contract. And with the growth of international law, aided by arbitral decisions, there has been less occasion or justification to rely upon force, for reference to law can now solve, if desired, practically all the claims arising out of injury to nationals by foreign states. International law, especially because of the scope given the local-remedy rule, has served to restrain, mitigate, and regularize diplomatic intervention, a political institution which innumerable

2. 3 VATTEL, *THE LAW OF NATIONS* (text of 1758, 3d ed. 1916) 136.

precedents from Foreign Office and arbitral tribunals have brought within the framework of a fairly consistent, if somewhat flexible, legal code.

Obviously, however, the institution of protection cannot be abandoned until either (a) a new conception of political states and nationality and their implications come into being, or (b) the nations agree that the welfare of their citizens abroad is of no concern to the home state. There are advocates of the latter theory, and it is possibly not without some merit. But as it is not likely that the institution of protection will be given up by states, perhaps one can, by outlining the merits and defects of the existing law and practice in the light of modern conditions, reach some tentative conclusions as to the desirability of modifying the policy.

In favor of the policy of protection, it has been said that it affords a guaranty of stability in the treatment of foreigners in less developed countries; that it tends to establish a process and measure of justice consistent with certain fundamentals, sometimes called international law, that it thereby benefits indirectly the local population; that, by its promise of aid to the maltreated national abroad and its prevention of future maltreatment of foreigners, it gives an assurance of stability and security which promotes investment and migration abroad and the development of countries not yet fully exploited; and that, when life is in imminent danger, it is humanitarian in its manifestations.

Against the policy it has been said that the clan conception is obsolete, and that protection abroad involves the people of two countries in a dispute essentially private; that its tendency is to place a premium on superior military strength in its contacts with weaker countries; that it substitutes the methods of politics for those of law; that it constitutes an invasion of the sovereignty and jurisdiction of weaker countries; that it makes the intervening state plaintiff, judge, and sheriff in its own cause, without adequate opportunity for an impartial investigation of the facts; that it thereby promotes injustice rather than justice; and that in its support of economic nationalism, it makes for imperialism and war.

The Vattel theory is also questioned on the ground of its essential unreality. It is argued that, in fact, the state is not actually, or even theoretically, injured when its citizen is injured. Vattel's alleged organic unity between the state and its citizens abroad may indeed be tenuous, especially at a time when business abroad is done largely by corporations with an infinite number of stockholders. Moreover, Vattel seemed to believe that an *individual* might, by injuring a foreigner, make the state liable—a doctrine now rejected, unless there is a denial of justice in the operation of the state machinery.³ Yet, Vattel was also a strong adherent

3. *Id.* at 139.

of the view that national sovereignty enabled the local state to assume complete jurisdiction of the complaints of foreigners and that only in the event of a denial of justice was there any basis for diplomatic intervention.⁴ He thus concluded that when the alien suffered a denial of justice there was a basis for intervention, but it is not altogether clear whether he considered that the state was avenging its own wrong or was merely acting as the natural protector, as the *parens patriae*, of the injured citizen. Vattel seems to have been more concerned about the protection of the citizen and the state's duty to protect him than he was about the personal injury to the state itself.

And yet, whatever conclusion Vattel's language may justify, it is clear that international law and practice have developed on the theory that, under the reciprocal obligations of allegiance and protection, the state has a definite interest in seeing that its citizen is not harmed by another state; that, when the state espouses the claim of its citizen, it has become a national public claim; that the state has full control over it; that it may settle it or drop it on any terms it chooses; and that the citizen has no right to control the prosecution.⁵ Overemphasizing the theory that the state was injured in the person of its citizen, the British counsel in the *Stevenson* case, before the British-Venezuelan Commission of 1903, argued⁶ that, notwithstanding the fact that some of the Stevenson children had been born Venezuelan or had acquired nationalities other than British, the British Government might still prosecute the claim because the deceased Stevenson was a British subject at the time of injury, and that the claim thus remained British forever.

In denying this contention on the ground that the beneficial interest in the claim was no longer British, the Umpire, Mr. Plumley, held that, whatever philosophic reason may have justified Great Britain in speaking

4. Protection was to be granted only "in cases where justice has been denied, or the decision is clearly and palpably unjust, or the proper procedure has not been observed, or finally, in cases where his [the sovereign's] subjects, or foreigners in general, have been discriminated against." *Ibid.*

5. See, for a summary of the principles and practice, BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* (1915) 355 *et seq.*; II PHILLIMORE, *INTERNATIONAL LAW* (3d ed. 1882) 4; MORSE, *CITIZENSHIP* (1881) xii, 60, 61; I WESTLAKE, *INTERNATIONAL LAW* (1904) 327 *et seq.*; I PRADIER-FODÉRÉ, *DRIT INTERNATIONAL PUBLIC* (1885) § 402; Bello and Liszt, cited in (1899) *FOR. REL.* 31-40; Mr. Root, Secretary of State, to the Persian Minister (Nov. 7, 1906) (1907) *FOR. REL.* Pt. 1, 942. See also (1824) 4 *AM. STATE PAPERS* 718; *ANNALS* 15th Cong., 1st sess. (1818) 282; Selwyn (Gt. Brit.) v. Venezuela (Feb. 13, May 7, 1903) *RALSTON, VENEZUELAN ARBITRATIONS OF 1903* (1904) 322; Moore, J., in *Mavrommatis (Greece) v. Great Britain*, Permanent Court, Ser. A, No. 2 (1924) at 63.

6. *Stevenson (Gt. Brit.) v. Venezuela* (Feb. 13, 1903) *RALSTON, op. cit. supra* note 5, at 439. See also the argument of the dissenting commissioner de Geofroy in *Wiltz (France) v. United States* (Jan. 15, 1880) 3 *MOORE, INTERNATIONAL ARBITRATIONS* (1898) 2250-53. *Cf.* Brief and Reply of United States in *Perché (France) v. United States, id.* at 2401 *et seq.*, *Boutwell's Rep.*, H. Ex. Doc. 235, 48th Cong., 2d Sess. (1884-85) Ser. No. 2305, at 43-53.

for British subjects who had legal title to the claim against Venezuela, international law had not driven the Vattel theory to any such extreme as to sustain the claim of those children who had acquired Venezuelan citizenship. This is merely a practical rule of law uniformly applied, almost without exception, by governments and claims commissions,⁷ and has but little bearing on the special reasons which justify the state in protecting its citizens abroad, whether it be a theoretic injury to the state itself, a duty as *parens patriae*, an exercise of the right of self-preservation⁸ or of equality⁹ or of intercourse,¹⁰ or that international law does not tolerate intervention on behalf of a person who has ceased to be a citizen of the complaining state. This last rule defendant states have the legal right to invoke; and in fact, the claiming state, unless some public national affront was involved, will practically always drop claims whose private owner has ceased to be its national.¹¹ States and Foreign Offices have sufficient trouble, without seeking to protect those who have thrown off or lost their nationality.

The Permanent Court of International Justice in two notable opinions preferred to adopt the prevailing theory of international law that when the state espouses and advances a claim in official form (i. e. does not merely protest or exercise unofficial good offices) it advances its own claim, its own right to have the defendant state vindicate the rule of international law in respect of its citizen abroad. Before official espousal, it may exercise good offices or protest merely to see that the delinquent state fulfills its direct duty to its citizen, the alien. The legal relations are not yet international; they exist between the alien and the state of his residence or investment, and his own government merely exerts friendly good offices to see that the alien receives satisfaction. After espousal and

7. See the many cases cited in BORCHARD, *op. cit. supra* note 5, at 660 *et seq.* Although the Vattel theory was sustained as sound by the Venezuelan claims commissions of 1903 and by the recent Mexican claims commissions, this does not militate against the further rule that continuous nationality in the claimant state is required. See Gleadell (Gt. Brit.) v. Mexico (Nov. 19, 1926) Decisions and Opinions (1931) 55, 64; Flack (Gt. Brit.) v. Mexico, *id.* at 81.

8. HALL, *INTERNATIONAL LAW* (6th ed. 1909) 273; HALL, *FOREIGN POWERS AND JURISDICTION* (1894) § 2; I RIVIER, *PRINCIPES* (1898) 269; DESPAGNET, *DROIT INTERNATIONAL PUBLIC* (4th ed. 1910) § 172.

9. POMEROY, *LECTURES ON INTERNATIONAL LAW* (Woolsey's ed. 1886) § 205 *et seq.*

10. OPPENHEIM, *INTERNATIONAL LAW* (3d ed. 1920) §§ 142, 319.

11. See BORCHARD, *op. cit. supra* note 5, § 142, as to national claims which survive private settlement, and *id.* § 308, as to loss of right to claim where citizenship has been lost subsequent to origin of claim. Gribble (Gt. Brit.) v. United States (May 8, 1871) Hale's Rep. 14; *Perché* (France) v. United States (Jan. 15, 1880), *supra* note 6, Boutwell's Rep., *supra* note 6, at 4-54. Mr. Boutwell states, at 54, that there were 33 cases of persons claiming compensation, who were citizens of France when the losses occurred, but who had in the intervening period become naturalized as citizens of the United States. These claims were all rejected.

official assumption of the claim, however, there are in law two rights and legal relations involved—the right of the claimant state against the defendant state to see that international law is respected vis-a-vis its citizen (i. e. that there shall be no denial of justice) and the private right of the citizen against the state of his residence. The two opinions in question—one in the *Mavrommatis*, the other in the *Chorzow* case—warrant quotation. In the *Mavrommatis* case the Court said:¹²

“It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.

“The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the state is sole claimant.”

In the *Chorzow* case the Court said:¹³

“It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law. This is even the most usual form of reparation; it is the form selected by Germany in this case and the admissibility of it has not been disputed. The reparation due by one state to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State.”

Certain members of the Institute of International Law at the Oslo session undertook to criticize these expressions of international law.¹⁴ It is submitted that the opinions quoted are quite sound and, unless stretched beyond their natural meaning, are unchallengeable as state-

12. Permanent Court, Ser. A, No. 2 (1924) at 12.

13. *Id.* Ser. A, No. 17 (1928) at 27-28.

14. *Supra* note 1, at 484, 489.

ments of international law.¹⁵ Nor are they in the least inconsistent with the views expressed by Judge Parker, to be mentioned presently, that the indemnity demanded and received is a national fund, notwithstanding the moral obligation to remit it to the community member, unless disqualified or equitably disentitled, on whose behalf it was obtained. No one doubts that the state speaks on behalf of an individual citizen; but from the very fact that the state speaks for the collectivity of citizens on behalf of one, the public interest has been engaged and the claim has been placed on a new terrain. It is now a matter of state against state, of collectivity against collectivity, not merely individual against state. Whether the state acts as a party or only as a protector or even as attorney,¹⁶ as some people seem (I submit erroneously) to think, the state machine has been invoked, the Foreign Office speaks with the national voice and asserts national positions, not merely to vindicate a private right, but to vindicate a public right—the right of the state to see that such wrongs are not committed, and that, if committed, they entail international responsibility.

To some this may sound tenuous or artificial; but much of the law, especially the law of corporations, rests upon artificial conceptions and theory. That does not make the law unreal, untrue, or irrational. The injury to the state may often seem remote or theoretical, but the collectivity cannot be said to be altogether disinterested in the fate of its members. Protection is one of the reasons for collective organization. Inasmuch as the individual has until the present had no personal right to sue the delinquent state in the international forum, he has perforce been remitted to a diplomatic remedy. That may be a crude method, but it necessarily makes the private claim the subject of political considerations, for his state may be able and willing or unable or unwilling to espouse his claim for any of a number of sufficient reasons, or else it may advance the claim under conditions and qualifications dictated by public and

15. See W. E. Beckett, *Question d'intérêt général au point de vue juridique dans la jurisprudence de la Cour Permanente de justice internationale* (Cours de l'Académie) 27-32, 88-89.

16. It has been uniformly denied by the United States that the Department of State is a claim agent or attorney. See citations in BORCHARD, *op. cit. supra* note 5, § 306. That is also the view of British law. *Rustomjee v. The Queen*, 1 Q. B. D. 487 (1876), 2 Q. B. D. 69 (1876); *Civilian War Claimants Association v. The King*, [1932] A. C. 14; *Administrator of German Property v. Knoop*, 49 T. L. R. 109, 113 (1932). This view was affirmed by the Permanent Court in the *Mavrommatis* and *Chorzow* cases, in the latter of which the dissenting view of Judge Nyholm, that the state was merely a mandataire, was definitely rejected. Permanent Court, Ser. A, No. 17 (1928) at 95. That the state may return part of the award to the defendant Government, and pay over only a part to the claimant, is confirmed by the recent case of *Heirs of Oswald v. Swiss Government* (June 17, 1926) *Bundesgerichtsentscheidungen* 52, II, 235, 599, reported in (1925-1926) ANN. DIG. OF PUB. INT. LAW CASES 244, 245.

national considerations. This is an incident of the modern state system; and until the individual, through treaties among the nations, secures an individual subjective right to sue a state before an international forum, it will doubtless remain so.¹⁷ No amount of resolutions by learned societies is likely to change the law and a practice of centuries. But it would seem clear that the disadvantages of political protection, whatever they may be, can hardly be eradicated by increasing them, particularly by permitting the individual to choose his protector state by acquiring a new nationality by naturalization and thus authorizing a new state to intervene on his behalf. To this problem we shall recur.

The fact that a state thus advances in theory and practice its own claim and undertakes entire management of the litigation, has been attacked as an antiquated notion and has led others to challenge the validity of the statement commonly made, that the fund received in payment of the claim is a national fund which the state alone controls. Both criticisms deserve consideration. No one will deny that the individual claim is ever present in the minds of all parties concerned, and that the benefits of recovery ultimately reach the injured individual. It would indeed be extraordinary if a state, receiving a fund from a defendant state in payment of a claim, were to pocket the money for itself. The mere fact that in most municipal systems there is no right of the individual to sue the state for the money received,¹⁸ or certainly to recover judgment—a conclusion which has led to the statement that the fund is a national public fund without private subjective right upon it—must not be understood as suggesting that any civilized state would have the temerity and bad faith to keep the money for itself. That would be an offense to the defendant state and would be an immoral act of the most reprehensible character. Judge Parker, as Umpire of the German-American Mixed Claims Commission, is believed to have expressed the correct legal relation in this matter when he said:¹⁹

17. There is nothing in international law, of course, as the Permanent Court stated in the *Chorzow* case, *supra* note 13, at 25 *et seq.*, reported also in (1927-28) ANN. DIG. OF PUB. INT. LAW CASES 258, 260, to prevent two states from agreeing by treaty, as they did perhaps in the clauses establishing the Mixed Arbitral Tribunals, to permit the citizens of one state directly to sue the other state, without intervention of the claimant's own Government. There is much dispute as to whether the claims under art. 297 (e) Treaty of Versailles are private only, or public, with the usual private element. See Schmid, note in I Zeitschr. f. ausl. öff. R. u. Völkerr. (Pt. 2) 102.

18. OP. SOL. for DEPT. OF STATE, J. Reuben Clark, Jr., (Distribution of Alsop Award) 17-27 (Washington, 1912); BORCHARD, *op. cit. supra* note 5, at 385 *et seq.*; Civilian War Claimants Association v. The King; Rustomjee v. The Queen, both *supra* note 16. For France, see Courson (Jan. 5, 1847) LEBON (1847) 1, Dubois (Apr. 30, 1867) *id.* (1867) at 421.

19. Administrative Decision V, Mixed Claims Commission, United States and Germany (1922) 190-193. See also the Opinions of Commissioners Anderson and Kiesselbach; William A. Parker (U. S.) v. Mexico (Sept. 8, 1923) Opinions of the Commissioners (1927) 35;

"Ordinarily a nation will not espouse a claim on behalf of its national against another nation unless requested so to do by such national. When on such request a claim is espoused, the nation's absolute right to control it is necessarily exclusive. In exercising such control it is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation and must exercise an untrammelled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised, and the private owner will be bound by the action taken. Even if payment is made to the espousing nation in pursuance of an award, it has complete control over the fund so paid to and held by it and may, to prevent fraud, correct a mistake, or protect the national honor, at its election return the fund to the nation paying it or otherwise dispose of it. But where a demand is made on behalf of a designated national, and an award and payment is made on that specific demand, the fund so paid is not a national fund in the sense that the title vests in the nation receiving it entirely free from any obligation to account to the private claimant, on whose behalf the claim was asserted and paid and who is the real owner thereof. . . . It is not believed that any case can be cited in which an award has been made by an international tribunal in favor of the demanding nation on behalf of its designated national in which the nation receiving payment of such award has, in the absence of fraud or mistake, hesitated to account to the national designated, or those claiming under him, for the full amount of the award received. . . . But the generally accepted theory formulated by Vattel, which makes the injury to the national an injury to the nation and internationally therefore the claim a national claim which may and should be espoused by the nation injured must not be permitted to obscure the realities or blind us to the fact that the ultimate object of asserting the claim is to provide reparation for the private claimant. . . . While the private claimant is in all things bound by the action taken by his Government, still, such a claim is not a national claim, nor the fund collected a national fund, in the sense that its private nature no longer inheres in it but is lost and merged into its national character and becomes the property of the nation."

It is obvious that these statements do not imply that the state is a mere attorney, without any public interest in the claim, and hence a mere figurehead, as has sometimes been assumed. The fact that the state can legally bargain away the claims of its nationals in the public interest should give pause to jurists who so contend.²⁰ When the United States Government bargained away the French Spoliation Claims of American citizens in 1800 in order to secure release from the treaty with France and

North American Dredging Co. of Texas (U. S.) v. Mexico (Sept. 8, 1923) Opinions of the Commissioners (1927) 21; Claims (National Control) Case, Tripartite Claims Commission, United States v. Austria, Hungary (1927) 21 AM. J. INT. LAW 599, 605, also (1927-28) ANN. DIG. OF PUB. INT. LAW CASES 262.

20. BORCHARD, *op. cit. supra* note 5, at 366-375 (Government's power to settle, compromise, release, or abandon claim; no obligation to consult claimant; power to determine opportunity for pressing claim; Government's power to renounce indemnity).

for other national advantages, will it be contended that the United States had no legal right to surrender the claims of its citizens? When the German Government by the Treaty of Versailles surrendered the legal claims of German nationals for injuries done them in Allied countries contrary to international law, or when by the Treaty of Rapallo it surrendered conditionally certain claims of German nationals against Russia, will it be asserted that this was without legal right? Whether the surrendering government assumes or does not assume the moral obligation of making good the surrendered claim internally is a matter which does not concern international law. When nations by treaty secure for their citizens the right to advance claims beyond that which international law permits, will it be suggested that this gift of a claim is without legal effect?

For example, in the Treaty of Berlin of 1921, following in this respect the Treaty of Versailles, Germany was made liable for injuries done to American factories in Germany by bombs dropped by Allied aviators and to an American shipowner by collision of his vessel with a French warship in the harbor of Havana. Is the United States only an attorney in advancing claims which would otherwise have no standing whatever in international law? When valid claims are rejected or withheld by the Foreign Office because political considerations foreclose their assertion, as in the case of American claims against Spain,²¹ or when their presentation is refused because they are not supported by sufficient evidence or are deemed by the Foreign Office not to justify intervention, as in the case of bond claims, will it be suggested that the Foreign Office does something illegal or improper?

The very facts that such complete control is in the first instance vested in the Foreign Office, and that in no country, so far as is known, has the individual the right to sue his government to compel it to take up his claim, are the best evidence that the claim, when espoused, has national and public aspects which the proponents of the extreme individualist theory seem disposed to overlook. The fact that the French Government espoused the claim of its citizens against Brazil and Serbia arising out of the gold clause in Brazilian and Serbian bonds²² has led to the belief that the French Government was acting solely as attorney and that the claim, as an individual claim, could not be considered by the Permanent Court of International Justice.²³ One need not be blind to

21. Spain has for two decades declined to consider diplomatic claims of American citizens until the United States agrees to consider the East Florida claims of Spanish subjects against the United States, a fact which has brought to an impasse claims relations between the two countries.

22. Permanent Court, Ser. A, Nos. 14 and 15 (1928).

23. So in the *Mavrommatis* claim, the Greek Government advanced the claim of its citizen against Great Britain. The basis of the public and of the private claim might have

the obvious facts and yet maintain that until the French Government officially espoused the claim it was not a public claim, but became so by that espousal. The French Government thereby made the claim its own, and that was the ground upon which the Permanent Court assumed jurisdiction. The case is a little unusual, because as a rule governments do not advance bond claims; yet where the interests are so widespread as in that case, and as they were in the case of British holders of French bonds for whom the British Government advanced a diplomatic claim,²⁴ there is no reason why the government may not espouse the claim and thereby make it national.

The same is true of the *Mavrommatis* claim, which was advanced by the Greek Government on behalf of a single citizen. It would be a mistake to conclude from the fact that the national or public interest seemed here nominal only, that therefore there existed no public interest or, more especially, that in all claims cases the public intervention is merely nominal. Exceptions, especially when only apparent and not real, never make rules, nor should generalizations be inferred from single instances. What has already been said concerning the complete control of the Government over the claim from original espousal through every stage of the proceedings to final settlement should dissipate any illusions that the Government's position is merely that of an attorney and that the only interest involved is in principle the private interest of the claimant. The experience of two centuries and an impregnable array of authority negative any such conclusion.

The fact that the awards of claims commissions are deemed national funds was strikingly evidenced by the effect of the Hoover Moratorium on the payments due the United States by Germany on account of private claimants who held awards of the Mixed Claims Commission. Mr. Hoover had excepted "private" claims; but when Germany expressed its willingness to pay the awards during the continuance of the Moratorium, as the United States desired, the French Government objected on the ground that this was a public, and not a private, claim. The United States, after studying the objection, felt constrained to admit that the French view was correct and that the sums in question were public international, and not private, debts.

It is superfluous to add that an international litigation, as in the Serbian and Brazilian franc cases,²⁵ is not the less international because the law

coincided, and yet when Greece espoused the claim, and only then, did it become an international claim.

24. British holders of French rentes issued in the United Kingdom in 1915-1819. Correspondence respecting the position of, July, 1930-January, 1931. Parliamentary Papers (France, No. 1, 1931) Cmd. 3779.

25. *Supra* note 22.

to be applied as the law of the case is municipal or internal law, e. g., the local law of contracts. It very frequently happens that an international issue turns upon the interpretation given to local law, alleged by the plaintiff state to have been misapplied by the defendant state with respect to its national. In the many cases now submitted to international arbitration where, by the treaty,²⁶ the claimant is relieved from the necessity of showing that he has exhausted his local remedies—the usual condition of an international claim,—the international tribunal deliberates and decides as might a local tribunal, passing as it does upon local law. And while its decision may not on that account constitute international law, the litigation and the tribunal are nevertheless international in character.

II

These fundamental principles, it is believed, serve to temper the criticisms of the theories which have at times been advanced in justification of the state's intervention in behalf of a citizen abroad. He is a third-party beneficiary of the duties which the state of residence owes to his state of allegiance—to see that no denial of justice takes place. It can hardly be doubted that the state of allegiance has in present practice an interest in the observance of international law in his behalf. Why it has such an interest and right to intervene may give rise to differences of opinion. It may be explained on the classical theory of the clan, namely, that the state is directly or indirectly injured in the person of its citizen; it may be that the state has only a protective function to perform as *parens patriae*; it may be that its interest is induced by its national right of self-preservation, which will be jeopardized by indifference to such wrong; it may be explained by virtue of the state's right to equality or of intercourse on legal terms. Diplomatic intervention may be and possibly is justified by a combination of some or all of these considerations. There is no necessity for insisting upon agreement as to the moral or theoretical explanation of a legal phenomenon which is in daily practice.

But whatever the best or soundest theory, not one of them sustains the power of the individual, by his voluntary act of naturalization, to transfer the right and ground of intervention from one state to another state. The confusion which would result from a transfer of the right of intervention by act of the individual would soon cause so much friction that the possibility of any such rule now or in the future can hardly be visualized or defended, it is submitted, on considered grounds of expediency, law, or policy.

26. See Treaty of Sept. 8, 1923, between the United States and Mexico, art. 5, 43 *STAT.* 1730, 1734 (1923); Treaty of July 28, 1926, between the United States and Panama, art. 5, U. S. Treaty Series 842.

Before approaching this subject a few words may be said about the legal character of diplomatic protection. Owing to a failure to agree upon the legal terrain of the discussion, a variety of views were expressed at the Oslo meeting of the Institute of International Law which, unless related to a common denominator, would be irreconcilable. Diplomatic protection was characterized as a "function" or "social function" of international law, as a "right" and as a "duty," and at times a "privilege."²⁷ There need be no disagreement on these matters. Certainly it is a "function" or "social function" that the state performs in protecting its national abroad. Very little help, however, is afforded by such a term, which is not legal, but ethical or physiological, not definitional, but descriptive in character. Right and duty, privilege and no-right, power and liability, immunity and disability are legal terms; and with these, the lawyer can, and should, be primarily concerned. In determining whether the state has a legal right to protect its national abroad, we must observe whether practice and law place the defendant state under a legal duty to receive or respond to a claim if the claimant state insists. Of this duty there can be little doubt, and it seems therefore of some advantage to indicate that the state has not merely a moral right or privilege to espouse and press a claim internationally, but a legal right to do so.

On the other hand, whether the individual has a legal right to compel his state to espouse the claim is a matter of internal law, not of international law. As remarked above, so far as the writer is aware, no state gives the individual a legal right to compel such espousal and prosecution, which is dependent entirely upon the discretion and good will of his government. If the petition is enforceable at all, it is through political, and not legal, channels. As the individual therefore has no such right against the state, the state has no legal duty to protect him, whatever we may think in a special case of its moral duty. It would be unfortunate to confuse legal and moral duties. The relations between the individual and his state, therefore, are such that, while the state is privileged as against other states to protect its national and has a right to have valid claims respected, it is under no legal duty to the individual and is under no legal duty to foreign states to prosecute a claim. It has higher obligations to the community than to any individual in it, and if national reasons and considerations impel it to decline protection, the individual has no legal recourse. But if it does espouse a claim, no defendant state can deny its privilege to do so and its right to press it internationally, though, of course, the defendant state has a full right to resist the claim in law on the merits or on jurisdictional grounds. These principles are well established.

27. *Supra* note 1, at 492, 495, 496, 499, 507, 509, 510, 511, 521, 522.

III

The reciprocal obligations of allegiance and protection have led Foreign Offices and arbitral tribunals to the conclusion that an essential condition of diplomatic intervention is that the injured national, in order to receive protection, must be a national of the protecting state at the time of injury, that is, at the origin of the claim.²⁸ More than this, as will be seen, is necessary, but this, at least, is required. Not only is this a most firmly established rule, but it is the writer's belief that the reasons which sustain it are of fundamental and impregnable validity. So long as the state system lasts (and at the moment it seems firmly entrenched), only the state of allegiance at the origin of the claim is likely to be recognized as the entitled protector.²⁹ Whether the theory of state injury in the person of its citizen or that of the state as *parens patriae* prevails, that state only has in the international sphere a right to speak on the citizen's behalf. Were any other state to attempt to protect him, it would be deemed an unjustified and improper intervention, an affront which would make international relations chaotic.

28. *Meyer (U. S.) v. Mexico* (March 3, 1849) Opin. 756, not in MOORE; *Zander (U. S.) v. Mexico*, 4 MOORE, *op. cit. supra* note 6, at 3432 (dictum); *Medina & Sons (U. S.) v. Costa Rica* (July 2, 1860) 3 *id.* at 2483; *Abbiatti (U. S.) v. Venezuela* (Dec. 5, 1885) *id.* at 2347; Southern Claims Commission, H. Misc. Doc. 16, 42d Cong., 2d Sess. (1871) Ser. No. 1524, at 1-30; and see argument in *Perché (France) v. United States*, *supra* note 6, at 2401, 2408; Pinkerton land claim, 20 OP. ATT'Y GEN. (1891) 118, 123.

Parrott & Wilson (U. S.) v. Mexico (Apr. 11, 1839) 3 MOORE, *op. cit. supra* note 6, at 2381; same claim, Act of March 3, 1849, *id.* at 2384; *Santangelo (U. S.) v. Mexico* (Apr. 11, 1839) *id.* at 2549; *Morrison (U. S.) v. Mexico*, *id.* at 2325; *Dimond (U. S.) v. Mexico*, *id.* at 2386; *Slocum (U. S.) v. Mexico* (Apr. 11, 1839 and Mar. 3, 1849) *id.* at 2382, 2385; *Dwyer & Grammant (U. S.) v. Mexico*, *id.* at 2322; *Sandoval (U. S.) v. Mexico*, *id.* at 2323; *Lasarte (Peru) v. United States* (Jan. 12, 1863) *id.* at 2390, 2394; *Hargous (U. S.) v. Mexico* (July 4, 1868) *id.* at 2327; *Fleury (U. S.) v. Mexico*, *id.* at 2156; *Dusen-berg (U. S.) v. Mexico*, *id.* at 2157. See decisions cited in 2 *id.* at 1353, including Judge Moore's comment; *Zayas de Bazan (U. S.) v. Spain* (Feb. 12, 1871) 3 *id.* at 2341; *Prieto*, *id.* at 2339; *Carillo*, *id.* at 2337; *Selway (U. S.) v. Chile* (Aug. 7, 1892) *id.* at 2557; *Corvaia (Italy) v. Venezuela* (Feb. 13, 1903) RALSTON, *op. cit. supra* note 5, at 809. See also Act of June 26, 1834, 6 STAT. 569 (1834), providing for East Florida claims of Spanish subjects. Peruvian indemnity (March 17, 1841) Att'y Gen. opinion, cited in 5 MOORE, *op. cit. supra* note 6, at 4593. Virginian indemnity, case of Gen. Ryan, H. Ex. Doc. 1, 45th Cong., 1st sess. (1877) Ser. No. 1773.

See also Administrative Decision V, *supra* note 19, at 175-185, where the subject is discussed at great length; Sir Cecil Hurst's conclusions (1926) BR. Y. B. OF INT. LAW 182.

29. As was well said by counsel for the United States in the *Perché* claim of France against the United States under the convention of Jan. 15, 1880: "It is the primary duty of every government to protect its own citizens, and this duty is a constant denial of a like power in any other government." Boutwell's Rep., *supra* note 6, at 44. And again, "The assumption that one government has capacity to protect the rights of citizens of another country is offensive to national sovereignty." *Id.* at 53.

The experience of two centuries definitely establishing who is entitled to protect diplomatically a particular national cannot be lightly overthrown, and especially where no constructive result from any change can well be pointed out. It is to be doubted whether claimant or defendant states would tolerate such confusion. Changes in the established law are, of course, always possible, but before they are entitled to acceptance, the effect of the change must be considered, and it must be shown that the old law was based upon misconceptions or outworn conceptions. It is submitted that no such conditions can be shown to exist in this department of human and legal relations. In the name of an alleged justice for individuals, we cannot set nation against nation, peoples against peoples, and thus promote international or group injustice and conflict. In the Institute debates at Oslo it was even suggested that it should be the function of international law to find a protector for a person who for any reason is refused protection by his own state.³⁰ What an interesting condition of affairs this would produce! When a person for any reason is denied protection by his state, other states would then be privileged to espouse the claim of this foreigner and thus create a political issue for their peoples, with all the possible consequences of such extraordinary intervention.

Here the desire for abstract justice, overlooking all practical considerations, does not even require naturalization. At least it is slightly more conservative, though, it is submitted, no more sound or sustainable, to suggest that the individual injured shall be naturalized in the new state before he can call upon its Foreign Office and all its people to protect him and intervene for him on a claim which arose when he was a citizen of another state and for which, presumably, he has not been able to obtain satisfaction. The attempt to naturalize claims by naturalizing the claimant is not unknown in the experience of Foreign Offices, but not until recently has such an effort received intellectual support. Now, however, in the person of a distinguished internationalist, such support has been found; and for that reason, the matter, though perhaps thoroughly settled in law, deserves reconsideration. The new view is perhaps best expressed in the words of its foremost proponent, M. Politis, as follows:³¹

"In a general manner, the report is based upon a classical and out-of-date conception of international law, which regulates solely the relations between states. Now, this thesis is not only contrary to the actual necessities of international life, but it is also contradicted by the real tradition of international law, whose very origins it disregards. One seeks in vain, in the writings of the canonists and of Grotius, for the exclusion of the individual in legal international relations. In

30. *Supra* note 1, at 494.

31. *Id.* at 487-488.

spite of appearances, it is no more in conformity with practice. The Reporter relies on the practice of diplomacy and jurisprudence in order to state the rule that protection ought not to be given or could no longer be exercised when the injured person has changed his nationality since the date of injury. The real situation is entirely different. A great number of cases apply a contrary theory. In truth, protection ought to be exercised in favor of the individual, without regard to change of nationality, except in those cases in which he makes a claim against the government of his origin, or decided to acquire a new nationality only for a fraudulent purpose, in seeking the protection of a strong government, capable of giving more influence to his claim. The objection raised by the Reporter of the difficulty of proving this fraud is not conclusive. Diplomatic practice shows numerous cases in which it has been possible to offer similar proof; there are celebrated cases, chiefly in the field of divorce, in which fraud has been held established and as a result no account has been taken of the change of nationality, which had been effected."

IV

In theology, I believe, it is perfectly permissible to make assertions having no evidential support in life or practice. In law, however, this is somewhat less common. The first question that the lawyer is entitled to ask, in the face of such an assertion as that quoted, is, Where is the evidence or authority for such a picture of alleged international law? Where is the evidence that the views expressed in Part I, above, which, it is believed, are fundamental to the subject in law and practice, are not only "classical," which will not be disputed, but also "out of date"? Will such evidence be found in the decisions of the Permanent Court of International Justice, in the *Mavrommatis* and *Chorzow* cases, or in the decisions of Judge Parker above quoted? I fancy not. On what authority is the statement made that these fundamentals contradict "the real tradition of international law"? They *are* the tradition, as is evident by the admission that it is the classical conception and, in fact, the only conception sustained by courts of law and Foreign Offices. The new conception is, it is submitted, a mental abstraction of those who wish, as they suggest, to reform the law, but who, if they were to prevail, might do enormous injury and confuse and embitter the relations between nations.

The statement proceeds to remark that "one seeks in vain, in the writings of the canonists and of Grotius, for the exclusion of individuals in legal international relations." Wherein do the present rules of international law in this matter exclude or overlook the rights of individuals? They are, in very truth, made for the benefit of individuals, but they embody the good judgment and restraint not to wish or permit the embroilment of nations and the perpetuation of international injustice for the alleged, though not often real, purpose of achieving individual justice.

Not every individual by any means is entitled to place two nations vis-à-vis in a matter arising out of his personal complaint. There is a certain order in international relations which should be promoted rather than disturbed, for there are now sufficient occasions for disturbance without seeking new ones; and the writings of the canonists and Grotius, interpreted or misinterpreted, are not the only sources of international law. Life and experience and practice are even more profound sources; but I find nothing in Grotius which can be deemed even remotely to challenge the present practice of diplomatic protection in the matter of nationality—practice which confines the rightful intervener to the state of which the injured person was a national at the time of injury, the so-called “origin” of the claim. If there is anything in the canonists to the contrary, it ought to be specifically proved. So far as I know, the institution of diplomatic protection was not their specialty, if, indeed, they were seriously concerned with it.

It seems strange, in the face of the irrefutable evidence of jurisprudence and practice submitted in Reports made to the Institute,³² to observe the remark that it is not international law that a person cannot by naturalization acquire a new protecting state for previously accrued international claims. It is said that “The real situation is entirely different. A great number of cases apply a contrary theory.” It does not appear unfair to ask where this “great number of cases” can be found, nor, in the face of the many cases of existing law and practice cited to the Institute, to rely upon mere assertion to contradict them. From the first claims commissions down to the most recent, the rule has been observed that naturalization does not naturalize old claims and give the naturalized citizen a new protector.³³ In no case with which the writer is familiar has this conclusion been questioned. In the very few cases which might be deemed to have permitted, though, with the exception of the *Orinoco Steamship* case, actually did not permit, a modification of the “nationality of origin” rule, the decisions rested upon a special treaty which assumed or pretermitted the question of nationality, or else the person protected was entitled, without change of nationality, to special protection of the protecting state, as in the case of foreign seamen on national vessels, protected persons in mandated territories, et

32. (1931) ANNUAIRE 282-288.

33. Gribble (Gt. Brit.) v. United States, *supra* note 11, at 14; Perché (France) v. United States, *supra* note 6, at 2418, Boutwell's Rep., *supra* note 6, at 4-54. See Boutwell's statement, *supra* note 11; Plumley, Umpire, in Stevenson (Gt. Brit.) v. Venezuela (Feb. 13, 1903) RALSTON, *op. cit.* *supra* note 5, at 446.

See also the statements of Secretaries of State Marcy, Fish, Bayard, and Gresham, quoted in VI MOORE, INT. LAW DIG. (1906) 636-638, and Umpire Parker in Administrative Decision V, *supra* note 19, at 176-177.

cetera.³⁴ Even in these cases, the general rule of international law has been recognized.³⁵ To say, then, that "the real situation is entirely different" requires proof by cases. The writer's own diligent search for them has not been rewarded.³⁶

When the learned defender of the naturalization of claims expresses the opinion that it *ought* to be the law, he is exercising a legal privilege. Anything can be proposed. But an endeavor will be made below to indicate that not only is it not now the law—quite the contrary—but that it would be highly inadvisable to make it the law. In fact, I am convinced that, even if the Institute of International Law should be persuaded that it ought to be the law, there will be very few, if any, Foreign Offices or tribunals that will consent to depart from the existing practice, which has not only worked well but is sound in theory and in reason.

Quite as well established as the rule that the claimant must prove his possession of the nationality of the claimant state at the origin of the claim, is the rule that he must possess that nationality at the time of

34. *Shields (U. S.) v. Chile* (Aug. 7, 1892) 3 MOORE, *op. cit. supra* note 6, at 2557-59, (1891) FOR. REL. 217 *et seq.*, Borchard, *op. cit. supra* note 5, § 206; *Najera (France) v. Mexico* (1924) (1927-28) ANN. DIG. OF PUB. INT. LAW CASES 256.

35. In the *Najera* case, involving a protected Syrian whose claim was covered by treaty, the Commission paid its tribute to "the general rule of customary law," by saying: "The general rule of customary law, according to which a state is authorized to put forward claims only on behalf of persons who possess its nationality (or stand under its protection) at the moment of the loss or damage as well as at the moment of the coming into force of the Claims Convention or of the presentation of the claim or of the award, does not apply when the circumstances of the case prove a contrary intention of the High Contracting Parties."

See also *Orinoco Steamship Co. (U. S.) v. Venezuela* (1909), in which the United States (Counter-case, 17-18) referred to "the time-honored and unquestioned principle of international law that an international reclamation must be clothed with the nationality of the plaintiff country both at the time of its origin and at the time of its presentation" and stated that the two countries "had expressly and intentionally contracted themselves out of the ordinary rule of international law" by using the terms "claims owned by citizens of the United States."

36. The only other cases in which this question appears to have been raised are *Landreau (U. S.) v. Peru* (1921) (1923) 17 AM. J. INT. LAW 157, at 172, and *Alsop (U. S.) v. Chile* (1909). In the former, the United States considered that the claim of a naturalized Frenchman arose *after* the naturalization. The tribunal, in view of the special agreement submitting the claim, considered itself disqualified from examining the question of nationality, but suggested purely as obiter dictum that it might not have been *ultra vires* for the United States to take up the case had it been deemed to arise prior to naturalization. The United States itself in the diplomatic proceedings contended otherwise, but whatever the United States might have done, Peru would have been legally privileged to reject the claim and refuse to arbitrate had the claim arisen before naturalization. In the *Alsop* case, His Britannic Majesty declined to consider the question whether the company was Chilean, though largely owned by American stockholders, on the ground that the special agreement foreclosed such inquiry. (1911) 5 AM. J. INT. LAW 1079, at 1035. Corporation and stockholder claims involve a quite different question.

the presentation of the claim,³⁷ diplomatically or to an international tribunal. This rule is justified by practice on the ground that, in order to give the claimant standing, he must indicate his permanent attachment to the country whose protection he seeks, or at least, if the claim has passed out of his hands by assignment, that a national of the state has at all times possessed it. Thus, the rule of continuity of nationality³⁸

37. See notes 11 and 33, *supra*, and Jarrero (U. S.) v. Mexico (March 3, 1849) 3 MOORE, *op. cit. supra* note 6, at 2324; Dimond's case, *id.* at 2388; Benson (U. S.) v. Peru (Jan. 12, 1863) *id.* at 2390; Mora (U. S.) v. Spain (Feb. 12, 1871) *id.* at 2397; Camy (France) v. United States (Jan. 15, 1880) *id.* at 2398; Maxan's Heirs (U. S.) v. Mexico (July 4, 1868) *id.* at 2485; Lizardi (U. S.) v. Mexico, *id.* at 2483; Levy (France) v. United States (Jan. 15, 1880) *id.* at 2514, 2518; Massiani (France) v. Venezuela (Feb. 19, 1902) SEN. Doc. 533, 59th Cong., 1st sess. (1905-06) Ser. No. 4937, at 211; Brignone (Italy) v. Venezuela (Feb. 13, 1903) RALSTON, *op. cit. supra* note 5, at 720; Miliani (Italy) v. Venezuela, *id.* at 759; Giacomini (Italy) v. Venezuela, *id.* at 765, 767; Gleadell (Gt. Brit.) v. Mexico, *supra* note 7, at 64.

There is no agreement as to what exactly is the "date of presentation." See seven different criteria cited *supra* note 32, at 284.

See note 39, *infra*.

38. Kane's notes . . . under the convention with France, July 4, 1831, Phila. (1836) 13, 21, 5 MOORE, *op. cit. supra* note 6, at 4471; Slocum (U. S.) v. Mexico (March 3, 1849) 3 *id.* at 2385, and Dimond (U. S.) v. Mexico, *supra* note 28, at 2386 (dictum); Loehr (U. S.) v. Venezuela (Dec. 5, 1885) Opinions of the Commission 87 (claim American in origin, sold to foreigner, and reassigned to American held barred); Treaty between Spain and Peru (Jan. 27, 1865) art. 5, XX MARTENS NOUV. REC. GÉN. (1875) 607; Gleadell (Gt. Brit.) v. Mexico, *supra* note 7, at 641; Flack (Gt. Brit.) v. Mexico, *supra* note 7, at 81. See *contra*: Petit (France) v. United States (Jan. 15, 1880) No. 255, Boutwell's Rep., *supra* note 11, at 84 (claimant a French citizen when claim arose, subsequently became naturalized as an American citizen and later became reintegrated as a French citizen; claim allowed). See also dictum in disallowed claim of Nicrosi (France) v. United States, *id.* at 87.

Practically all the countries, certainly all the major countries, which answered the questionnaire submitted for the Bases of Discussion by the Codification Conference of 1930 accepted as law the rules of international law herein suggested as traditional. Only Bulgaria, Hungary, Egypt, and Norway suggested that any change might be considered. League of Nations, Vol. III—C.75.M.69.1929 V, 140-145. The Preparatory Committee observed, at 145: "According to the opinion of the majority, and to international jurisprudence, the claim requires to have the national character at the moment when the damage was suffered, and to retain that character down to the moment at which it is decided; the basis of discussion which is submitted is founded on this view." Basis of Discussion No. 28 reads as follows:

"A state may not claim a pecuniary indemnity in respect of damage suffered by a private person on the territory of a foreign state unless the injured person was its national at the moment when the damage was caused and the claim is continuously owned by a national or nationals until it is decided.

"(First paragraph redrafted.)

"Persons to whom the complainant state is entitled to afford diplomatic protection are for the present purpose, assimilated to nationals.

"(Paragraph 2 remains unchanged.)

"In the event of the death of the injured person, a claim for a pecuniary indemnity

in the claimant state is an essential corollary of the rule that nationality at the time of presentation is a condition of jurisdiction to protect. This is not only a rule of internal law, insisted on by claimant states, but a rule of international law, for defendant states can avail themselves of it to reject on jurisdictional grounds a claim the private owner of which does not fulfill the necessary conditions. If states wish to depart from the rule, they can, of course, by special agreement do so; but the instances of such departure are exceedingly rare and are explainable on special grounds.³⁹

The reasons for the rule requiring continuity of nationality are in the main two: (1) to prevent claims from becoming the subject of international barter, and thus to disable the claimant from acquiring a new protector at his option; and (2) to prevent states from buying up or acquiring old claims for purposes of political pressure. However much we may seek to make diplomatic claims entirely legal in character—and international tribunals dealing with the subject of international responsibility have aided greatly in this desirable objective,—the fact remains that diplomacy is both a legal and a political method, and it is unavoidable that political considerations should enter into the presentation of claims through the diplomatic channel. To avoid undue complications, the rule naturally developed that only the state of which the individual was a national at the time of origin and at the time of presentation and continuously in the intervening period, shall be privileged to espouse and advance the claim, for otherwise any nation could make a private claim the subject of international controversy and conflict. Every Foreign Office can doubtless cite efforts of claimants to induce it to take up claims not strictly national in character, and the Foreign Office, having a sense of responsibility to its own people, whom it must keep out of foreign trouble, and to other states, whom it must not improperly harass, keeps a sharp lookout against the attempt to utilize the Foreign Office as a claim agent. A competent Foreign Office usually scrutinizes national claims minutely to make certain that its efforts are not unwisely or improperly enlisted, in the light of the two responsibilities above mentioned. Hence, when a government advances a claim, it has presumably already passed upon the jurisdictional issue above mentioned and has

already made by the state whose national he was can only be maintained for the benefit of those of his heirs who are nationals of that state and to the extent to which they are interested.

“(Paragraph 3 remains unchanged.)”

39. Notes 34 and 35, *supra*. Very occasionally, by way of exception, non-national heirs or successors of a decedent national have been given jurisdictional standing before a commission. See *Cisneros (U. S.) v. Spain* (1871) 3 MOORE, *op. cit. supra* note 6, at 2334; *Betancourt (Spain) [U. S.] v. United States [Spain]* (1902) Spanish Treaty Claims Commission, Fuller's Rep. 44.

satisfied itself that towards its own people and the defendant state it is warranted in espousing the claim. It may have been imposed upon, proof of which from any source, whether from the defendant state or otherwise, will usually result in an immediate abandonment of the claim.

But if it were to be possible to take on new claims by naturalization of their owner, we should have a scramble which would make the traffic in arms much less dangerous than the traffic in claims.⁴⁰ It is not only strong states whose naturalization would be sought, but also states whose political relations with the defendant state are such that hope of adjustment would be promoted. For example, for a claimant against Spain, it would now be much better to have Mexican citizenship than United States citizenship. It would be a great windfall for lawyers having hopeless cases if they could then advise their clients which states offer the most hope of successful collection of the claim. How long the people whose political organization and machinery are thus abused would submit to such a practice is hard to say, but I fancy not long, even if any nations could be persuaded to make the experiment.

There are, however, three arguments advanced by the new school in support of their proposal which deserve consideration:

(1) "First it [the classical rule] check-mates the essential principle of the freedom of the individual to determine his own nationality."⁴¹ It is respectfully submitted that the rule in question, namely, that an inter-

40. Said Umpire Parker in Administrative Decision V, *supra* note 19, at 176-177: "It is no doubt the general practice of nations not to espouse a private claim against another nation unless in point of origin it possesses the nationality of the claimant nation. The reason of the rule is that the nation is injured through injury to its national and it alone may demand reparation as no other nation is injured. As between nations the one inflicting the injury will ordinarily listen to the complaint only of the nation injured. A third nation is not injured through the assignment of the claim to one of its nationals or through the claimant becoming its national by naturalization. While naturalization transfers allegiance, it does not carry with it existing state obligations. Only the injured nation will be heard to assert a claim against another nation. Any other rule would open wide the door for abuses and might result in recovering a strong nation into a claim agency in behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal of their claims."

See Secretary of State Bayard, 1886: "Subsequent naturalization does not alter the international status of a claim which accrued before naturalization." See other opinions and decisions of American Secretaries of State in VI MOORE, *op. cit. supra* note 33, at 636-640, and Sir Cecil Hurst's statement, concurring with the traditional rule, "This excludes all right of a Government to put forward claims on behalf of an individual who obtains its nationality by naturalization if the claims arose before the naturalization." (1926) BR. Y. B. OF INT. LAW 168.

According to M. Oudinot, (1924) CLUNET 359, the French Government, in distributing reparation indemnities, decided that a beneficiary must have been French at the moment the damage was done and retain French nationality continuously.

41. *Supra* note 1, at 487.

national claim must be possessed by a national at the time of origin and presentation, has little, if any, relation to the liberty of the individual to change his nationality. He is as free to change his nationality as the laws of his country and those of the naturalizing country permit. But he cannot escape the legal consequences of his change of nationality. The suggestion that such change should have no consequences, unless based on treaty violation,⁴² is not tolerated either by practice or by theory. The fact that naturalization does have consequences, however, seems to constitute the basis of the objection to the existing rule of law.⁴³ But it is submitted that, if the national wishes the benefit of naturalization in a new state, he must also assume any consequent disadvantages. He cannot have it both ways.

The suggestion that a person can acquire a new nationality and thereby naturalize his old claim, transferring the right of protection to a new state, is characterized by John Bassett Moore as a "legal monstrosity." I cite John Bassett Moore, because he has had as much, if not more, experience in this subject than perhaps any other lawyer and statesman, and because his views are, as a consequence, entitled to the very highest respect. He says in a letter, the publication of which he has authorized and which is now a part of the records of the Institute of International Law:⁴⁴

"In no respect does the government claim money for itself on account of the injury to its citizen or subject. The pecuniary compensation is demanded for the individual. The question raised as to the consequence of naturalization affects, not the injury to the individual and his corresponding compensation, but *the right of governmental intervention to obtain such redress*. If an individual sees fit to transfer his allegiance from one government to another by obtaining naturalization, he must take the consequences of his act, or, in other words, must accept the disadvantages with the advantages. Among the disadvantages is the possible or probable refusal of the government whose allegiance he has abjured to continue its intervention in behalf of a citizen who has abandoned it, and withdrawn from it his support.

"On the other hand, the individual has no power to transfer the *ground of intervention*, namely, the wrong done to the government in the person of its citizen.

"To admit the existence of such a power would be a legal monstrosity. It would create a standing temptation to citizens of weak governments to transfer their allegiance to stronger governments, by giving to such transfer a commercial value. I have in my own experience known this to be attempted, with false and fraudulent documents framed with a view to evade the inhibition.

"Where a government intervening on behalf of an injured citizen demands,

42. *Id.* at 517.

43. See note 40, *supra*.

44. *Supra* note 1, at 266-268.

because of the flagrant character of the wrong and its *discriminatory* character, something on its own account, it demands an apology or salute to the flag; if it demands *smart money*, this, if recovered, is paid to the claimant, and is not retained by the government. And there is, again, a public reason for this. Apart from the question of dignity, it would not be desirable to concede to governments a financial interest in the pecuniary redress. Governments are not always so much above suspicion that they may safely and with unimpaired dignity act as collecting agents, with a fee at stake in the recovery. And how would the amount of the fee be fixed? Would the government require reimbursement of its expenses? These are not fanciful questions, but are real and practical. As you well know, governments have sometimes defrayed the expenses of international commissions by deducting a percentage from the awards. Again, if the ground of governmental intervention—the wrong done to the government in the person of its citizen—could be transferred by the individual, how would the new recipient of his allegiance look in demanding an apology or a salute to its flag for an insult to another government? Or would the abjured government continue to press for the apology or salute, while the new recipient of allegiance demanded the money? We should then have the wonderful spectacle of an alleged offender menaced by two governments, the one it actually offended demanding a spiritual solace while the one it never offended snatched the money.”

(2) It is argued, also, that the existing rule of law “deprives the individual who has changed his nationality of all international protection for the injury which he suffered in the past.”⁴⁵ If that is the consequence of a voluntary change of nationality, all that can be said is that it is a necessary consequence. It is not easy to defend a rule which, in order to enable claims freely to be naturalized, would bring nations and peoples into political conflict. It has already been observed that every international claim places two whole peoples vis-a-vis; to increase that possibility by permitting a free exchange in naturalized claims is no service to orderly international relations or to peace.

But why such solicitude for the man who denationalizes himself? He has changed nationalities, doubtless, with his eyes open and for his personal advantage. Why permit him, in spite of the advantages he seeks and obtains, to complicate international relations in the bargain? Why seek to give him new advantages, advantages which may easily embroil nations? Not every one has a right to diplomatic protection. Nationals at home have no such protection; why should all foreigners have it under all circumstances? Many foreigners now are deprived of it, for sound reasons, and sometimes for accidental ones. Should the citizen be allowed to disentangle himself from the disadvantages of association with a particular state, in order to associate himself with a state where the advantages of successful prosecution seem greater? If *some*

45. *Id.* at 487.

foreigners are treated as are *all* nationals, that cannot be called an affront to individualism or a denial of justice. Because some foreigners happen to be citizens of strong states and others of weak states is a circumstance which cannot be helped. If that seems an injustice, the only way to cure it is to bar all diplomatic protection and permit recourse to an international tribunal to all foreigners having what is called an international claim. The difficulty cannot be cured by permitting citizens of weak or unpromising states to become naturalized in strong or more promising states and thereby naturalize their claims. There will always be some inequalities in this world, but they can hardly be cured by increasing the political difficulties to which they give rise. And that would be the consequence of a legal privilege freely to acquire a new protecting state. There is no need for tears of sympathy for the stateless person or the citizen of a badly situated state who cannot obtain effective diplomatic protection. Such persons must simply accept the same judicial remedies against the state which nationals possess. Diplomatic protection is not a subjective right, but an extraordinary privilege. The whole effort of a century has been to strengthen the local-remedy rule by improving internal justice, so as to limit the necessity for international claims.

The disadvantages of diplomatic protection, for the very reason that political considerations play so large a part,⁴⁶ cannot be ameliorated by increasing diplomatic protection and permitting the citizen himself to elect his protector, but rather by diminishing the necessity and opportunity for diplomatic protection by enabling individuals to sue foreign states in an international forum. That will have to be planned carefully, in order to persuade states thus to permit themselves to be sued; but only such an institution would make nationality immaterial, which is really the objective at which the *Politis* school appears to be aiming. It cannot be made immaterial, however, by permitting free trade in claims.

To the argument that naturalization can thus be made the basis for obtaining any desired protecting state, the answer is made that this consequence should be denied when it is sought for purposes of "fraud."⁴⁷ But what is "fraud" and how is it to be proved? The purpose of the argument evidently is to suggest that, when the injured national acquires a new nationality for the purpose of acquiring protection for his claim, then that is "fraud." But that seems to be a new definition

46. BORCHARD, *op. cit. supra* note 5, §§ 144, 146, 147, 389.

47. "There are three exceptions which M. *Politis* seeks to emphasize: 1. The case of fraud" [*supra* note 1, at 522]; or again, "if the person interested has sought the acquisition of his present nationality for the purpose of being able to benefit by the diplomatic protection of the claimant state." *Id.* at 526.

of "fraud," for it confuses motive with illegality or bad faith. One can rarely prove what the motive for naturalization really was. To illustrate: A German who has a claim against Poland acquires French nationality. France has a freer political organization, is a republic, permits freer opportunity for doing business, and has perhaps other advantages which make an appeal to human choice. It also happens to have better political relations with Poland. When naturalization was obtained, no mention was made of the claim the German possessed. In fact, he may suggest that he only found the claim in his baggage when he unpacked or only remembered it after naturalization. How can it be proved which of the advantages France offered was the predominant one motivating the naturalization? The German alone may know the answer; and when the issue becomes ripe, he may, even in good faith, maintain that the claim was not the major motive.

Or France may decline to espouse the claim, and he then becomes, a few years later, naturalized in England. Is England now to take up the claim which France and perhaps Germany rejected? We can even assume that, having now acquired the wanderlust, he may become naturalized in Poland. Now, presumably, he has exterminated his international claim. But if the view of the new school were tenable, this ought to be deemed unjust, an injustice which perhaps can be cured by his becoming now a citizen of Czechoslovakia. Or let us take marriage. The girl is a blonde, with blue eyes, has a dimple in her cheek, is highly intellectual, has a sweet disposition—and is wealthy. Who can prove which of these attractions were the most alluring to the fortunate husband? And if the issue were raised whether the man married her for her wealth, rather than for her looks, intellect, or disposition, is he likely to admit it? If he denies it, how can it be proved?

France or the other countries on the itinerary may readily conclude that the man saw in his new country many advantages other than the opportunity to press his claim internationally and will insist that the naturalization was not undertaken with the claim in mind. Poland may be more skeptical. Are we now to have a new kind of international struggle, diplomatic or judicial, which shall turn on the question of the motive with which a new nationality was acquired? This will be jumping from the frying pan into the fire, so far as concerns the protection of individual rights.

The suggestion that every country has had experience with fraudulent naturalization,⁴⁸ with naturalization that is not "sincere," and that

48. *Id.* at 517. Fraudulent naturalization based on objective facts evidencing a violation of the letter or spirit of the law may always be challenged, even by the defendant state. *Salem (U. S.) v. Egypt* (Jan. 20, 1931) Award of Arbitral Tribunal (Washington, 1933) 36, and BORCHARD, *op. cit. supra* note 5, at 522. This is quite different from challenging motive in acquiring naturalization.

"decisions of the courts seek always to determine whether the change has not been vitiated by fraud"⁴⁹ presents issues entirely different from those here involved. Naturalization certificates are cancelled in most countries if the law has been violated, if any of the conditions of naturalization has not been observed, or if operative facts have been falsified. I know of no country that would cancel a naturalization certificate or consider the naturalization fraudulent because one motive rather than another, either of which is perfectly legal, actuated the petitioner in acquiring naturalization. It is not "fraud" to take advantage of a legal right to become naturalized; and motive, as every lawyer knows, is one of the most difficult things in human experience to prove.⁵⁰

The analogy of "*détournement de pouvoir*"⁵¹ is even more tenuous. That is a charge against officials who abuse their administrative power for illegitimate ends. It cannot be applied to individual private rights. The "*abus de droits*" might afford a better analogy. But even in such case, a wrongful object is always in view. Here the object, diplomatic protection, is not wrongful, but, on the contrary, the whole argument of the Politis school suggests that diplomatic protection by a new state is in the highest interest of individual justice. Only, they seem to say, the individual must not have known that he could be or would be diplomatically protected. If he knew it, then there is "fraud." This might imply that perhaps only morons should be admitted to naturalization, or people who know nothing about their legal rights, or who have never consulted a lawyer, or who do not know what an international claim is. The notion that naturalization is not fraudulent, or that protection by the new naturalizing state can be given, only when a person has an international claim he did not know about, or that the claim in no sense had anything to do with the motive for naturalization, indicates, it is submitted, the hollowness and futility of any rule based upon such a premise. Moreover, let us observe the rule that is proposed to the Institute by MM. Politis and de La Pradelle:

"Art. 6—The legal relation between the person and the state, which conditions the exercise of diplomatic protection, ought to exist at the moment of the presentation of the claim."⁵²

According to these proposals, the rule that the injured person must have the nationality of the protecting state when the claim *arose* is entirely dispensed with, and all that is necessary is that nationality be

49. *Ibid.*

50. Referring to civil matters, Chief Justice Brian long ago remarked, "The intent of a man is not triable." Y. B. 17 Edw. IV, Pasch. pl. 2; see 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1923) 374.

51. *Supra* note 1, at 524.

52. *Id.* at 503, 526.

shown at the time of presentation. Not only does this permit any number of naturalizations before a protecting state is found, but—a matter which appears to have been entirely overlooked by the proponents—without any naturalization whatever the private claim may be assigned from one hand to another, until it comes into the hands of the national of a state which is willing to extend its protection. If there is any rule of international law that has had no exceptions, it is the rule that a claim cannot be voluntarily assigned or transferred to a national of another state and thereby acquire a new diplomatic protection.⁵³ The rule proposed would make this perfectly legal and possible.

But the proponents of the new order admit certain exceptions. It was conceded that, if the person who is naturalized abroad seeks protection against his original state, even when he was a dual national at the time of origin, the new state should not be privileged to extend protection. This is a thoroughly established rule, and no one has questioned it. The Nineteenth Commission incorporated it as self-evident, but the rule is no more firmly established than the other rules mentioned in the early part of the present article. It indicates that the alleged universal justice which the new school advances as the source of its inspiration cannot actually be universal. Many persons must get along in this life without diplomatic protection.

Another necessary exception was raised during the discussion on the floor. That is the case where the injury out of which the claim arose is based on a treaty between the defendant state and the country of original nationality.⁵⁴ It struck the Institute as strange that France should be able to invoke against Poland the violation of a treaty between Germany and Poland. So that exception was hastily admitted on the floor. But what about the many cases in which injury occurs because the injured person is a national of a particular state, and the attack indicates a bias against nationals of that state? How about the anti-Greek riots in South Omaha in 1909 or the anti-Italian riots in New Orleans in 1891? Are these Greeks and Italians to be permitted to acquire new nationalities and then involve the United States in a diplomatic conflict with many new countries, perhaps much of the world? This benevolent interference in other people's troubles has already

53. See VI MOORE, *op. cit. supra* note 33, at 638-640, and the following typical ruling of Secretary of State Bayard: "It is a settled rule in this Department that a claim which the Department can not take cognizance of in its inception because of the alienage of the creditor, is not brought within the cognizance of the Department by its assignment to a citizen of the United States." *Id.* at 639.

See also *Jarrero (U. S.) v. Mexico*; *Dimond's case*; *Benson (U. S.) v. Peru*; *Mora (U. S.) v. Spain*; *Camy (France) v. United States*, all *supra* note 37.

54. *Supra* note 1, at 517.

brought much disaster to the world. Are we to have no end of inter-meddling?

One member very properly suggested the problem of the injury done by boycotting with government connivance, an injury directed against citizens of a particular nationality. If the country whose citizens are thus boycotted does nothing for the victim, and whether it does or not, is a new naturalizing country to take up the boycotting claim?

Or take such issues as are connected with particular national policies toward the law. Many countries decline to protect their citizens abroad in the matter of contract claims, including bond claims, claims for military or other contractual service, et cetera. Shall the citizen of such a country be permitted to naturalize himself in a country not taking so strict a view of international limitations on diplomatic protection, and thus obtain the protection his original country would not have extended? Or take the claims connected with the Calvo clause. Some countries decline to protect citizens subscribing to such a clause. Others maintain that the citizen is not capable of contracting away the privilege of his country to protect him, which is a national public right, and not a private subjective right.⁵⁵ Is the citizen of the former group of countries, signer of a Calvo clause, to have the privilege of naturalizing himself in a country of the second group, and thus acquire a protector free of political and moral inhibitions?

These are but a few of the considerations which must be taken into account if naturalization of claims by naturalization of the claimant is to be considered in practical terms. They perhaps indicate the confusion in international relations, if not, indeed, the chaos, which would result from permitting such an extraordinary innovation in international relations as that suggested. I doubt whether any Foreign Office, either of the claimant or defendant states, would give it serious consideration; but if they would, I have little doubt that the difficulties to which it would at once give rise would soon persuade the nations to overthrow the proposal and adhere to the existing law, which has served individuals as well as can be expected consistently with the preservation of moderately harmonious relations among the nations.

The new school finally assert (3) that the rule of established customary law, the existence of which they even purport to deny, "check-mates the resolution voted at Lausanne (1927) by the Institute, declaring that the responsibility of the state could be asserted without taking into consideration the nationality of the claimant."⁵⁶

The writer has been unable, after careful examination of the 1927 Resolution of the Institute on the Responsibility of States, to find any

55. BORCHARD, *op. cit. supra* note 5, §§ 373, 374.

56. *Supra* note 1, at 437.

such declaration.⁵⁷ On the contrary, the Institute⁵⁸ subscribed in that Resolution to the classical, Vattel theory of diplomatic protection. Apart from this consideration, however, it has always been true that there are certain limitations on diplomatic protection and international responsibility, arising out of the jurisdictional deficiencies of the claimant, out of the subject-matter of the controversy, out of the censurable conduct of the claimant, out of the political relations between the two states, out of any number of considerations which serve to deprive a particular foreigner of diplomatic protection and to relieve the defendant state of responsibility. As already observed, nationals have to forego such extraordinary political protection. No reason is apparent why every person's or even every foreigner's claim should become the subject of political controversy between two states and peoples. In fact, it has been regarded as a gain to limit diplomatic protection on this very account. Yet now sympathy is expended on those who by their own personal act deprive themselves of the opportunity of making their complaint, justifiable or unjustifiable, the subject of political controversy between two states and peoples. It seems a strange reform to propose, and for any one of an infinite number of reasons it is, it is submitted, unsound in theory, in policy, in reason, in practice, and in law. It is indeed not only a legal, but a political, monstrosity.

V

While nothing can be said for the suggestion that voluntary naturalization shall be permitted to naturalize and transfer the nationality of old claims and the right to protection, it is perhaps possible to say something for involuntary change of nationality by death or territorial succession. It is the general practice that the heir or next of kin must have the same nationality as the decedent in order to obtain diplomatic intervention in his behalf. Failure to prove the nationality of the one or the other generally deprives the claim of diplomatic support or international jurisdiction, although cases are not uncommon in which widows, without proving their own nationality, have been permitted to recover for injuries inflicted upon their husbands. As a general rule, however, in order that a claim may be sustainable, there must be proof that both

57. The nearest approach to any such suggestion is Article IV, which expresses the view that local measures of protection and remedies for injuries committed by private individuals should be non-discriminatory as between nationals and foreigners. But this is something entirely different from the matter here under discussion. We deal here with *international* responsibility and the identity of the particular country which is privileged to invoke it.

58. Article X of 1927 Resolution, Vol. III, at 333.

the person injured and his successor in interest possessed the same jurisdictional nationality.⁵⁹

International tribunals and Foreign Offices have sought to make sure that the beneficial interest in the claim, not only at the time of origin, which has always been insisted upon, but also at the time of presentation, is properly protectable by the claimant state. For this reason, while the heir must usually be a national, it is generally unnecessary to prove the nationality of an administrator, or even sometimes of an executor, of an estate whose original owner was injured.⁶⁰ The very few exceptions to the rule that the beneficial interest in the claim must be national are made not only where the original claimant was a national but where the heir is a non-national.⁶¹ No cases are known where the original injured person was *not* a national of the claimant state, but where the claim was presentable by a successor in interest, citizen of the claimant state.⁶² The citizenship of the *heir* could possibly be dispensed with, but not the citizenship of the original injured person.⁶³ And yet, there is no reason why two states, if they so desire, cannot in case of state succession enter into an agreement that the succeeding state, rather than the old state, shall continue to press the international claims of those whom it acquires as nationals, without their consent. Such a treaty would change the existing customary law, but there may be some reason for stipulating such changes. It is not possible, however, to compel defendant states to respect such a treaty and accept the claims of an injured national of one state who by succession has become the national of a second state. All that can be done is to express a hope or *voeu* that such treaties ought to be respected, and possibly in time treaty law will become customary law.

59. See authorities and cases cited *supra* note 32, at 318 *et seq.*

60. *Id.* at 324.

61. See the full discussion of these cases in the comprehensive article by Sir Cecil (now Judge) Hurst, *Nationality of Claims* (1926) BR. Y. B. OF INT. LAW 162, and the exhaustive note of Umpire Parker to Administrative Decision V, *supra* note 19, at 186. See also the Memorial of United States and Answer of Great Britain in the *Studer* claim, Arbitration of Aug. 18, 1910, which furnished the basis for the article of Sir Cecil Hurst. See also *supra* note 32, at 287, and cases cited.

62. In the "Opinions Dealing with Claims of American Nationals for Damages Growing out of the Deaths of Aliens" [Opinions of the Mixed Claims Commission, United States and Germany, at 195; (1925) 19 AM. J. INT. LAW 630], the theory of allowance was that the person originally injured was the American dependent, and that the claim was not derivative. For criticism of these opinions, see Borchard, *Opinions of the Mixed Claims Commission, United States and Germany* (1926) 20 AM. J. INT. LAW 69-72.

63. It is interesting to observe that the bulk of the countries which responded to the questionnaire preliminary to the Codification Conference of 1930 considered that any method of change in nationality, whether voluntary or involuntary, had the same disqualifying effects, namely, to forfeit the right to protection. League of Nations, Vol. III, *supra* note 38; see also *Canevaro (Italy) v. Peru* (1913) Scott's Hague Court Rep., 291-292.

VI

This study will, it is hoped, have demonstrated, first, that there is no sound justification for attempting the practically impossible task of changing the established and proper rule of law that a claim must be national in origin, and, second, that it is not sufficient if it be merely national at the time of presentation. The latter rule would create such confusion in international relations that it is not now tolerated by practice and cannot be tolerated, I submit, in theory. But that diplomatic protection falls far short of an ideal system may be conceded. Its defects, however, are of a character which are susceptible of remedy, not by widening the evil still more through expansion of protection, but rather by diminishing it through enlarging the judicial channel of relief (a) by obligatory judicial submission, at the lowest possible expense, of claims which justify such submission, and (b) by affording the individual access to international tribunals under safeguards to be worked out.

It is not so much the principle of protection which is open to challenge as it is the method of carrying it into effect. To a considerable extent the methods of protection are political and occasionally military, whereas they should be legal and judicial. Under the present system all three parties to the issue—the individual, the defendant nation, and the claimant nation—are in a precarious and unenviable position. Occasionally politics rather than law has governed the outcome of a case. If the individual is a member of a strong clan (state), he may be able to obtain the aid of his nation; if not, he is in this respect helpless. Thus his relief, which should be governed by legal rule, depends upon the accident of his nationality. Protection will also often depend upon the momentary political relations between the plaintiff and the defendant states, on the political strength of the defendant state, and on other non-legal factors. The defendant state is in the position of having coercion exercised upon it on the unilateral determination of a foreign government that its citizen's rights have been violated. The weaker the state, the more exposed is it to arbitrary intervention, until in very weak states a responsibility amounting almost to a guaranty of the security of foreigners and their property is imposed. Such a state may indeed, to avoid the threat of intervention or compulsory measures, pay a claim essentially unjust. A strong defendant state, on the other hand, may, on occasion, without fear of intervention, violate with impunity the rights of an alien and may decline to arbitrate. The unfortunate factor in most interventions is that the complaining state is likely to constitute itself plaintiff, judge, and sheriff at one and the same time. This can hardly be deemed "the rule of law" or "reign of law," as Maitland put it. Nor is the plaintiff state exactly in an enviable posi-

tion. It must make *ex parte* determinations on inadequate evidence, and may be influenced by domestic political considerations to espouse a claim it should not support. On the other hand, it may be unable, by virtue of its political relations with the defendant state, to press a claim which makes a strong appeal legally and equitably. Thus all three parties to the issue—which involves a question whether the citizen abroad has sustained a denial of justice, a purely legal question—are exposed to the disturbing interference of politics as a determining factor. This does not make for the growth of law or for peace.

It has been suggested heretofore that the nations should voluntarily agree automatically to submit all pecuniary claims to arbitration if diplomacy fails, and that arbitration should be deemed an inherent part of due process in such matters. At the Pan-American Conferences of 1902 and 1910 and at the Pan-American Conference in Washington in January, 1929, the nations on this continent committed themselves to such a course. Many nations have been unwilling up to this time to consent to treaties (such as Article 36 of the Statute of the Permanent Court) providing for the mandatory submission to judicial determination even of indisputably legal questions. They should no longer hesitate to do so. Were this done all three parties to the issue would be assured that law, rather than politics and force, would be the determining factor in the protection of foreigners. The individual alien would not depend for his rights upon the accident of nationality, the defendant state could rely on law for the determination of its rights and protection against unjust intervention, and the plaintiff state would be relieved from the pressure of politics inducing intervention, the dangers of war, and the charge of imperialism.

But whether or not the nations all agree to submit pecuniary claims to arbitration, the individual alien himself should have the opportunity of trying the issue in the international forum before his state becomes politically involved in the case. Thus, before interposition becomes proper, the alien should be required not only to exhaust his remedies in the local courts, if practicable remedies are available, but he should also have the opportunity of instituting a suit against the defendant state before an international court, if he believes that an international denial of justice has taken place, to his prejudice. This is not a radical step, for it was stipulated in the agreements establishing the Central American Court of Justice of 1907, the abortive International Prize Court, and numerous Claims Commissions, such as that of the War Claims Arbiter in Washington. It would require treaties by which states would agree to permit themselves to be sued, but there ought to be a strong incentive on the part of both defendant and plaintiff states to institute this intermediary forum. What is desired is to assure to the alien the

protection of due process of law without the necessity of coercion and all that it implies, physically, psychologically, politically, and legally. By enabling the injured citizen to sue the defendant state in the international forum, possibly with the financial aid of his government if the claim is deemed meritorious, the cause of peace and all three parties to the issue would be benefited, for the parties would rely upon legal processes for the insurance of international due process of law to the alien. That is all that any of the parties has the right to ask. Such treaties ought to be easier for the continental and the Latin-American states to conclude than for those of the Anglo-American world, where the tradition that the Government may be sued in courts is not yet fully established.

An analogy from administrative law lends support to the theory and practice suggested. In the eighteenth century the natural-law school of jurists advocated the right of resistance to unlawful acts of state prejudicing the individual. As that spelled disorder, the state met the popular demand for defense against illegal acts by instituting administrative and sometimes judicial courts in which the validity of its acts could be tested and determined. That is what is needed in international law, and the institution of similar procedure does not seem an unusual demand to make upon the nations. To promote the reign of law by permitting the Government to be sued for injuries it inflicts upon aliens should not invite opposition. To extend the practice, under safeguards, from the local to the international forum is but a slight advance. The institution of the practice would remove from the political to the legal field an important department of international relations, and correspondingly attenuate the prevalence of force and political considerations in the protection of citizens abroad.